

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of the
Liquor Licenses Issued
to G M & H, Inc., d/b/a
Grand Central at 788
Grand Avenue, St. Paul.

FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATION
AND MEMORANDUM

A hearing in this matter was held on June 15, 1989, in St. Paul, before Allan W. Klein, Administrative Law Judge from the State Office of Administrative Hearings.

Appearing on behalf of the City of St. Paul was Thomas Weyandt, Assistant City Attorney, 647 City Hall, St. Paul, Minnesota 55102. Appearing on behalf of the Licensee, G M & H, Inc., was Richard J. Kadrie, Attorney at Law, Suite 400, 310 Cedar Street, St. Paul, Minnesota 55101.

This Report is a recommendation, not a final decision. The City Council will make the final decision after a review of the record. The Council may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61 and the City's Legislative Code 310.05 (c-1), the final decision of the Council shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Council. Parties should contact Thomas Weyandt to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Did Licensee allow alcoholic beverages to be displayed and consumed at Grand Central at approximately 2:50 a.m. on April 27, 1989?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Grand Central is a food and liquor establishment located at 788 Grand Avenue in the City of St. Paul. The facility has operated under various names

and ownership interests since at least 1980. G M & H, Inc. currently holds an on-sale liquor license, a Sunday liquor license, a restaurant Class D license, and an entertainment Class 4 license. All these licenses are set to expire on January 31, 1990.

2. Donald E. Wilson is a police officer for the City of St. Paul police department. He has been with the Department for approximately five and

one-half years, and for five years has worked in the southwest section of the city. Four and one-half of those five years, he has worked on the midnight to 8:00 a.m. shift. Officer Wilson is familiar with the businesses along Grand Avenue, and is familiar with Grand Central. Officer Wilson passes by Grand Central an average of twice per night, although the actual number of drive-bys can vary from none to five, depending upon the needs for his services. The vast majority of nights, however, he merely drives by Grand Central, and does not enter. He has entered the establishment approximately 24 times in five years, which is roughly once every two and a half months.

3. Officer Wilson had worked as a bartender in two bars in the past. While he was in college, between 1977 and 1978, he worked at a bar in Rochester, Minnesota an average of four nights per week. He generally was the person who closed the bar. He also worked at Michael's restaurant in Rochester for eight months, working the night shift at the bar. He was responsible for cleaning up and closing the bar. He does, therefore, have experience in bar operations which enhances his evaluations of activities in bars.

4. At approximately 2:45 a.m. on the morning of Thursday, April 27, 1989, Officer Wilson was driving along Grand Avenue when he noticed unusual activities in the parking lot of the Grand Central. He noticed about 13 or 14 cars in the parking lot, noticed others parked along Grand Avenue directly in front of Grand Central, and noticed a large white truck backed into a set of doors as if it were being loaded or unloaded from the premises. Officer Wilson glanced at the front windows of the Grand Central, and saw nothing unusual, but decided to stop and investigate the matter.

5. The front door to Grand Central faces north onto Grand Avenue. The parking lot is to the east of the building, between Grand Avenue and the alley which separates Grand Avenue from Lincoln Avenue. The parking lot runs the full length of the half block on the south side of Grand Avenue. There are large plate glass windows on three sides of the bar building. They are on the north side (facing Grand Avenue) on the east side (facing the parking lot) and on the south side (facing the alley).

6. Officer Wilson parked his squad car, and proceeded towards the north facing windows, the ones which face Grand Avenue. Although there were lights on in the bar, they were turned down very low, and the bar area was quite dark. The windows were tinted, and flowers obscured a direct view of the entire bar. Nevertheless, Officer Wilson was able to perceive "quite a few" people in the bar. He then went around to one of the east windows and was able to see more people in the bar. He then went around to one of the south windows, and saw even more people. The people were generally sitting at the bar, and a woman was behind the bar. While he was watching from the north windows, Officer Wilson observed a woman take a sip from a green bottle which he thought was a bottle of Moosehead beer. From all three vantage points he saw several glasses of what he thought were beer and "low-ball" cocktail glasses containing liquid. He assumed these were alcoholic beer and other

alcoholic beverages.

7. After he had observed the inside of the bar from the north and east windows, he proceeded to the south window. He shined his flashlight inside the window, aimed at the general area of where the woman had been drinking out of the green bottle. The woman drinking out of the green bottle noticed it.

He then shined his flashlight on his badge to identify himself. The woman immediately turned her back on him, as did other women sitting near her. Officer Wilson then proceeded past the large white truck towards the back door of the establishment. As he was nearing the back door, it was opened for him. The individual who opened the door identified himself as an employee, and let Officer Wilson in.

8. When Officer Wilson entered the bar, he observed approximately 11 to 12 people seated at the bar, most of whom had some sort of beverage in front of them. The individual who let him in the door stated that all the people in the bar were employees and were just finishing cleaning up following a fundraiser for a cancer research project. While Officer Wilson was talking with the employee, he noticed two glasses of amber liquid on the bar. One was full, and had a head of foam on it as if it was beer that had recently been drawn. The other was between half and three-quarters full. After Officer Wilson had been told that everyone there were employees, he directed the individual who had let him in the door to get their time cards. At that point, several of the people approached Officer Wilson and indicated they were not employees of the bar, but were rather affiliated with the fundraiser which had been held there that night. While this was going on, the woman behind the bar was removing all of the glasses and bottles from the bar. At the same time, Anthony Gagliardi (one of the owners) approached Officer Wilson, and introduced himself. Officer Wilson indicated that it was late in the evening, but Mr. Gagliardi explained that he had just concluded a fundraising event for cancer research which had drawn a very large crowd, and it took longer than usual to clean up because of the large crowd. Officer Wilson replied that it was 2:50 in the morning and Gagliardi should have had all the drinks off the bar long ago. Officer Wilson indicated that because of the lateness of the hour, he deemed this to be a flagrant violation and told Gagliardi that he was going to write up a citation for displaying alcohol after hours. Gagliardi then asked him, "Where is there alcohol displayed?", and motioned towards the bar. By this time, the bar was entirely clean of any glasses or bottles.

9. Officer Wilson proceeded to issue Gagliardi a citation (#3-31883) for after-hours display of alcohol. Gagliardi signed it, and promised to appear.

10. Wilson did not check out the time cards of the employees, he did not take the names of any of the people present, and he did not collect any evidence of alcohol being dispensed or consumed. He did not, for example, examine any of the bottles or glasses which had been just removed from the bar. He did not do any of these things because he did not feel it was necessary because the violation was, in his mind, so flagrant.

11. Officer Wilson had noticed that on occasion there would be an unusually large number of cars parked in the lot next to Grand Central. However, during approximately the month immediately preceding April 27, the frequency of this occurring had seemed to increase. Officer Wilson knew a fellow officer who frequented the bar, and Officer Wilson told his fellow

officer that he might want to warn Gagliardi about keeping a strict observance of closing hours. That was approximately two weeks before the incident that Officer Wilson talked with his friend, and at the time of the incident, Officer Wilson was unaware of whether the friend had talked with Gagliardi or not. Sometime after the incident, Officer Wilson learned that his friend had, in fact, talked with Gagliardi before April 27, and had essentially warned him about the appearance that he might be operating after hours.

12. Wilson's observations of the bar, both from the outside through the windows, and from the inside after he entered, showed roughly the number of glasses that would be expected given the number of people sitting at the bar. In other words, there were not a large number of glasses concentrated in one place as might be the case if they had been cleaned up from various parts of the facility and brought over to the bar for cleaning. Based on his experience and his observations both through the window and when he first entered the bar, Wilson believed that Grand Central was not in the process of being cleaned up just prior to closing, but rather people were sitting around the bar drinking.

13. The fundraiser in question was known as the "Ride for Life" children's cancer research fundraiser. It involved comedians and other entertainers, and a band. It was also videotaped by a professional filming crew. This crew used three large cameras which required the construction of special platforms. The cameras were connected by cable to a truck which housed more electronic equipment. The sponsors of the event began setting it up about noon, and it took approximately five hours to get all the equipment and decorations in place. The band donated its services to the fundraiser, as did some of the entertainers and the film crew. All the door proceeds went to the fundraising entity, as did a percentage of the bar sales.

14. There had been a noise complaint against Grand Central called in earlier that evening, near midnight.

15. Dismantling the equipment and returning the facility to a normal condition after the fundraiser had ended took longer than usual. Some of the bar's personnel helped with the cleanup of the equipment, and thus they did not begin cleaning up the bar itself (including such jobs as clearing glasses off tables and delivering them to the bar for cleaning) as early as they normally would.

16. At about 2:45, the truck with the video equipment had just left, and one of the owners and the manager, Anthony Gagliardi, had just taken the receipts downstairs for placement in a safe when he was told there was an officer upstairs. He was not gone from the bar area for more than a minute.

17. There were 15 employees working for the bar that night, an additional nine in the band, and an additional ten associated with the videotaping work.

18. Gagliardi had received a prior citation from a different police officer in connection with gambling on the premises. The date of the violation was approximately a year and a half ago, but due to various legal proceedings, the actual six-day suspension received did not begin until April of 1989. The net impact of the six consecutive day closing was approximately \$25,000. Gagliardi knew that any future violations would result in more severe penalties, and he had recently been warned about the after hours problem. He had instructed his employees to strictly enforce a "nothing served after 1:00" policy on both customers and other employees. Employees were allowed to drink non-alcoholic beverages after 1:00, but not alcoholic beverages. Gagliardi is certain that on the date in question, no alcohol was served, consumed, or displayed after 1:00 in the morning.

19. Gagliardi does serve near-beer, but in brown bottles, not glasses. He does not serve Moosehead beer in bottles. He does serve Claushauler beer

in green bottles that are shaped like Moosehead bottles. Claushauler beer is non-alcoholic.

20. The green bottle in question was not a bottle of Cold Spring sparkling water. Officer Wilson testified that although he could not be positive, he believed that the bottle of Cold Spring sparkling water which was introduced into the record as Exhibit 7 was shaped differently than the bottle which he saw on the bar. A Claushauler bottle is more similarly shaped to the Moosehead bottle which Officer Wilson described than is Cold Spring sparkling water.

21. On May 11, 1989, Assistant City Attorney Philip B. Byrne issued a Notice of Hearing indicating that a hearing would be held on June 15 which might lead to adverse action against G M & H's licenses as a result of the display and consumption of alcoholic beverages on licensed premises on April 27, 1989. The Notice set forth various procedural information and informed the Licensee of various rights and opportunities available through the hearing process.

Based upon the foregoing Findings, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the City Council and the Administrative Law Judge have jurisdiction in this matter, that proper notice was timely given, and that all other procedural requirements of law or rule have been complied with.

2. That the burden of proof is upon the City to prove, by a preponderance of the evidence, the facts alleged and to demonstrate that the facts constitute a violation of the ordinance or statute.

3. That the City failed to prove that alcoholic beverages were consumed or displayed, or that the Licensee allowed their consumption or display, on April 27, 1989 at Grand Central.

4. The attached Memorandum is incorporated herein.

Based upon the foregoing, the Administrative Law Judge makes the following:

RECOMMENDATION

That the City dismiss the proceedings against G M & H, Inc., d/b/a Grand Central, and that no further disciplinary action be taken.

Dated this 16th day of June, 1989.

ALLAN W. KLEIN
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the City is requested to serve its final decision upon each party and the Administrative Law Judge.

Reported: Tape Recorded.

MEMORANDUM

This case essentially boils down to comparing the bar owner's word that no alcoholic beverages were consumed or displayed, against the police officer's assumption that what he saw constituted the display and consumption of alcohol. Unfortunately, there is no "hard" evidence. If the green bottle had been retrieved from behind the bar, we would know whether it was Moosehead, Heinekens or Claushauler. If the officer had smelled or tasted the amber liquid in the glass, we would know if it were beer, and whether it had been recently drawn or had sat in the glass for some time. Unfortunately, these things were not done, and we are left without any hard evidence to know what was going on there. Were the employees, band members and entertainers just sitting around after a hard night of work, sipping on Claushaulers and ginger ale? Or, on the other hand, were they sitting around drinking beer and whiskey, with the bar essentially remaining open for business for nearly two hours after 1:00 a.m.?

The standard of proof applicable in these cases requires the City to prove that a violation occurred by a "preponderance of the evidence". That is a much easier standard to meet than the criminal standard of "beyond a reasonable doubt". Nonetheless, assumptions and inferences do not carry anywhere near the weight that "hard" evidence does. The only person observed drinking was a woman at the bar, who was drinking out of a green bottle. The bottle was observed through a window, and Officer Wilson candidly admitted that he could not read the label from that distance. The bar stocks both Heinekens and Claushauler in green bottles. We do not know which it was. The officer assumed it was Moosehead, but the bar does not stock Moosehead in bottles. Therefore, we are left with only hunches and guesses with regard to whether or not a violation occurred. Under such circumstances, the City has failed to meet its burden.

A.W.K.